

FROM THE COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS

The Committee solicits comment on the following proposals by September 1, 2002. Comments may be sent in writing to Sharon M. Brown, Reporter, Model Civil Jury Instructions Committee, Cadillac Place 3034 West Grand Boulevard, Suite 8-300, Detroit, MI 48202, or electronically to MCJI@jud.state.mi.us.

PROPOSED

New and Amended Malicious Prosecution-Criminal Proceeding Instructions

The Committee is considering adoption of the following new and amended malicious prosecution instructions. The proposed amendment to M Civ JI 117.02 informs the jury of defendant's burden to prove affirmative defenses.

**[AMENDED] M Civ JI 117.02 Malicious Prosecution-- Criminal Proceeding:
Burden of Proof**

**[NEW] M Civ JI 117.03 Malicious Prosecution -- Criminal Proceeding:
Termination in Favor Of Accused**

**[NEW] M Civ JI 117.04 Malicious Prosecution -- Criminal Proceeding: Probable
Cause**

M Civ JI 117.02 Malicious Prosecution-- Criminal Proceeding: Burden of Proof

Plaintiff has the burden of proving each of the following:

- a. Defendant caused or continued a prosecution against the plaintiff.
- b. The proceeding was terminated in favor of the plaintiff.
- c. Defendant initiated or continued the proceeding without probable cause.
- d. Defendant initiated or continued the proceeding with malice or a primary purpose other than that of bringing an offender to justice.

***(The defendant has the burden of proving the defense that (Describe defense.)*)**

If you find that plaintiff has proved each of the elements that I have explained to you, *(and the defendant has failed to prove the defense of (Describe defense.)), your verdict will be for the plaintiff.

If you find that the plaintiff has failed to prove any one of the elements, *(or if you find that the defendant has proved the defense of (Describe defense.)), your verdict will be for the defendant.

Note on Use

***The sentence and the phrases preceded by an asterisk should be used only if an affirmative defense is an issue.**

Whether the proceeding terminated in favor of the plaintiff is a question of law if there are no disputed issues of material fact. *Cox v Williams*, 233 Mich App 388; 593 NW2d 173 (1999). If the trial judge determines as a matter of law that the proceeding terminated in plaintiff's favor, the jury should be so instructed and subsection b of this instruction should be deleted.

Probable cause is a question of law if there are no disputed issues of material fact. *Matthews v Blue Cross and Blue Shield*, 456 Mich 365, 381-382; 572 NW2d 603 (1998). If the trial judge determines as a matter of law that defendant did not have probable cause, the jury should be so instructed and subsection c of this instruction should be deleted.

Comment

It is a complete defense to an action for malicious prosecution that the prosecutor exercised independent discretion to initiate and maintain a prosecution, unless defendant knowingly provided false information on which the prosecutor based the decision to prosecute or unless defendant knowingly omitted exculpatory information which would have dissuaded the prosecutor from prosecuting the plaintiff. *Matthews v Blue Cross and Blue Shield*, 456 Mich 365; 572 NW2d 603 (1998). (Where the prosecutor exercises independent discretion, it negates the first element of the cause of action; defendant is not considered to be the one who caused or continued the prosecution.)

For a discussion of the defense of reliance on advice of an attorney (including on the direction and advice of a prosecuting attorney) see *Matthews*, 456 Mich 365, 379-381.

M Civ JI 117.03 Malicious Prosecution -- Criminal Proceeding: Termination in Favor Of Accused

A criminal proceeding is terminated in favor of an accused if the accused is acquitted. It is also considered terminated in favor of an accused in other circumstances.

In this case, you must find that the proceeding terminated in favor of the plaintiff if (Describe facts and circumstances that, if found, would constitute a favorable termination, i.e., dismissal because of failure of complaining witness to testify, coerced guilty plea.). You must find that the proceeding did not terminate in favor of the plaintiff if (Describe facts and circumstances that, if found, would not constitute a favorable termination.).

Note on Use

Whether the proceeding terminated in favor of the plaintiff is a mixed question of law and fact. *Cox v Williams*, 233 Mich App 388; 593 NW2d 173 (1999). If there are disputed issues of material fact, the trial judge should instruct the jury on the circumstances that would constitute a favorable termination. See, *Blase v Appicelli*, 195 Mich App 174; 489 NW2d 129 (1992).

Comment

Dismissal of criminal charges, not by compromise or settlement, but at the request of the prosecution or the complaining witness is a termination of proceedings in favor of the plaintiff. *Cox v Williams*, 233 Mich App 388; 593 NW2d 173 (1999). A settlement or compromise brought about by duress or coercion is also considered a termination in favor of an accused. *Blase*; see also, *Kostrzewa v City of Troy*, 247 F3d 633 (6th Cir 2001).

M Civ JI 117.04 Malicious Prosecution -- Criminal Proceeding: Probable Cause

Defendant had probable cause if, based on the facts and circumstances known to [him/her] at the time [he/she] [initiated/ continued] the criminal proceeding, [he/she] reasonably believed that plaintiff was guilty of a crime. Probable cause may be based on information received from others, but only if the information is of such a reliable kind and from such reliable sources that a reasonable person would believe the information is true.

***(In this case you must find that defendant had probable cause if (Describe facts and circumstances that, if found, would constitute probable cause.). You must find that defendant did not have probable cause if (Describe facts and circumstances that, if found, would not constitute probable cause.).)**

Note on Use

***This paragraph may be used if appropriate.**

Probable cause is a mixed question of law and fact. *Matthews v Blue Cross and Blue Shield*, 456 Mich 365, 381-382; 572 NW2d 603 (1998). This instruction may be used if there are disputed issues of material fact.

In lieu of giving this instruction, the trial judge may instruct the jury to find a special verdict setting forth the circumstances under which they find the proceedings were initiated or continued, and the trial judge then will determine as a matter of law whether the facts as found by the jury constitute probable cause. (This approach is recommended in *Matthews v Blue Cross and Blue Shield*, 456 Mich 365, 382 n 22; 572 NW2d 603 (1998).

If a special verdict form is used, it should be carefully drafted to ensure that the jury decides all facts necessary to enable the court to determine probable cause. The difficulty in drafting such special verdict forms, as well as in setting forth in an instruction the hypothetical facts which, if proved, constitute probable cause is discussed in Comment Note.--Probable Cause or Want Thereof, in *Malicious Prosecution Action*, as Question of Law for Court or Fact for Jury, 87 ALR2d 183 (1963).

Comment

This instruction is based on the frequently cited instruction to the jury in *Wilson v Bowen*, 64 Mich 133; 31 NW 81 (1887), quoted with approval most recently in *Matthews*. Probable cause involves an objective test– what a reasonable person would believe. *Matthews*. It is reversible error to allow the jury to determine probable cause without having been given a definition of probable cause. *Abdul-Mujeeb v Sears Roebuck & Co*, 154 Mich App 249; 397 NW2d 193 (1986).

It is not sufficient to merely define probable cause for the jury, the correct practice is for the trial court to instruct the jury under what set of facts and circumstances which may be found from the evidence the defendant would or

would not have probable cause. *Renda v International Union, UAW*, 366 Mich 58; 114 NW2D 343 (1962); *Slater v Walter*, 148 Mich 650, 656-657; 112 NW 682 (1907); *Wilson*. The reason for this rule is that while the jury resolves factual disputes, whether the facts constitute probable cause is a question of law for the court. See, e.g., *Matthews*, 456 Mich 365, 382. However, a failure to augment a definition of probable cause may or may not result in reversible error. Compare *Wilson* and *Renda*.

Malice may be inferred from lack of probable cause, but probable cause may not be inferred from an absence of malice. *Matthews*, 456 Mich 365, 378.

The affirmative defense of reliance on advice of an attorney after full and fair disclosure of material facts should not be confused with probable cause. *Matthews*, 456 Mich 365, 379-380.

Since 1980, the Michigan Supreme Court has delegated to the Standard Jury Instructions Committee (now the Committee on Model Civil Jury Instructions) the authority to propose and adopt Standard Jury Instructions (now Model Civil Jury Instructions). MCR 2.516(D). In drafting Model Civil Jury Instructions, it is not the committee's function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The committee's responsibility is to produce instructions that are supported by existing law.

The members of the Committee on Model Civil Jury Instructions are:

Chairman: Hon. Harold Hood

Reporter: Sharon M. Brown

Members: Thomas H. Blaske; Hon. Susan D. Borman; David C. Coey; Hon. Pat M. Donofrio; Peter L. Dunlap; Hon. William J. Giovan; Mark R. Granzotto; R. Emmet Hannick; Hon. John A. Hohman, Jr.; Maurice G. Jenkins; Steven W. Martineau; Hon. Susan Bieke Neilson; Hon. Wendy Potts; Hon. Robert M. Ransom; Michael B. Rizik, Jr.; Mary Massaron Ross; Valerie P. Simmons; George T. Sinas; Sheldon J. Stark; Susan H. Zitterman.